

UNITED STATES DISTRICT COURT
DISTRICT OF VERMONT

MOUNTAIN CABLE COMPANY, :
et al. :
 :
v. : Civil No. 1:03CV219
 :
PUBLIC SERVICE BOARD OF :
THE STATE OF VERMONT and :
VERMONT DEPARTMENT OF :
PUBLIC SERVICE :
_____ :

RULING ON PLAINTIFFS' MOTION TO STAY DEFENDANTS'
ENFORCEMENT ACTIVITIES AND MOTION TO STAY ALL PROCEEDINGS
(Papers 6 and 8)

I. Background

The plaintiffs are cable operators which provide service in Vermont under the business name "Adelphia Cable Communications" (hereinafter collectively referred to as "plaintiff" or "Adelphia"). The local franchising authority, the Public Service Board of the State of Vermont (hereinafter the "Board"), has awarded each of Adelphia's various cable operators a "Certificate of Public Good" (collectively referred to as the "Certificate"). The Certificate authorizes Adelphia, inter alia, to construct and operate cable franchises in Vermont, as that term is defined in 47 U.S.C. § 522(9) of the Cable Communications Policy Act of 1984. See Complaint (Paper 1) at 2; see also 30 V.S.A. § 502(b) (empowering the Board to grant, renew and revoke cable franchises).

When accepting those franchises, Adelphia agreed to extend cable lines to some of the more sparsely populated areas of the state. In several administrative proceedings which precede this litigation, the state contends that Adelphia refused to honor the line extension obligations it undertook when accepting the franchises to provide cable service in Vermont.

In response, Adelphia maintains it can no longer meet the costs of extending service. By filing this action, Adelphia seeks modification of Certificate provisions which require it to construct new lines into rural areas. The gravamen of Adelphia's argument is that the cost of extending cable service to rural Vermont has substantially and unexpectedly increased since the issuance of the Certificate, thereby rendering the current requirement "commercially impracticable." Complaint at 3.

These same line extension requirements are the subject of a different line of attack in a related action also pending before this Court, Docket No. 1:00CV298 (hereinafter "Adelphia I"). See, e.g., Mountain Cable Co. v. Public Service Board, 242 F. Supp. 2d 400 (2003). In Adelphia I, plaintiff asserts, inter alia, that the Board erroneously computed the average cost per mile of line extensions it is required to make. It asks this Court to review the Board's decision to renew its

franchises, subject to various conditions it finds objectionable, including the allegedly erroneous and expensive "cost per mile" requirement.

On October 16, 2002, the Court held oral argument on the two pending motions to stay. Commenting on some of the differences between this action and *Adelphia I*, the plaintiff explained that *Adelphia I* requires the Court to determine whether the Board correctly established the "density formula including cost per mile." Put most simply, the Board has required the plaintiff to extend lines to any mile with 14 homes and has estimated the cost as approximately \$12,000 per mile. The plaintiff, however, computes the actual cost as closer to \$20,000 per mile, and rising. See Memorandum In Support of Plaintiffs' Motion to Stay (Paper 7) at 3-4 and n.2 (discussing in detail the "qualifying density formula").

By contrast, in this case *Adelphia* asks the Court to further modify the line extension obligations by finding that, as of this date, the cost per mile has now risen to approximately \$26,000 per mile, thereby making extension of lines to areas with as little as 13-14 homes per mile not only onerously expensive but commercially impracticable. Thus, if *Adelphia* succeeds in *Adelphia I*, the number of miles of cable it will have extend may be reduced; however, a decision in its favor in *Adelphia I* will not address the additional costliness

and modification request raised in this suit. It is apparent, therefore, that while resolution of Adelpia I should precede consideration of this action, it will not necessarily result in the resolution of this case.

II. Discussion

A. Motion to Stay Enforcement Activities

The plaintiff has moved to “stay” the defendants from pursuing any enforcement activities related to the line extension requirements until final adjudication of Adelpia’s petition to modify those requirements as commercially impracticable pursuant to 47 U.S.C. § 545. See Motion to Stay Enforcement Activities (Paper 6) at 1. This request is denied for several reasons.

First, though styled as a “motion to stay,” the plaintiff primarily seeks injunctive relief. It is well established that a party seeking injunctive relief must show: (a) it will suffer irreparable harm in the absence of an injunction; and (b) a likelihood of success on the merits or sufficiently serious questions going to the merits to make them fair ground for litigation and a balance of hardships tipping decidedly in the movant’s favor. See, e.g., Genesee Brewing Co., Inc. v. Stroh Brewing Co., 124 F.3d 137, 142 (2d Cir. 1997). Adelpia has made no attempt to sustain its burden of demonstrating

that it will suffer irreparable harm or that it will likely succeed on the merits of its claim.

In addition, Adelphia is asking this Court to interfere with state proceedings, which arguably signals a problem under the Eleventh Amendment. See Will v. Michigan Dep't of State Police, 491 U.S. 58, 71 (1989) (a suit against a state official in his official capacity "is no different from a suit against the State itself"). While the Supreme Court occasionally has approved injunction suits against state regulatory commissioners, those cases involve unique circumstances where the "complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." Verizon Maryland Inc. v. Public Serv. Comm'n of Maryland, 535 U.S. 635, 645 (2002) (citation and quotations omitted).

In this case, the proceeding which Adelphia seeks to stay is not alleged to be unconstitutional or to violate federal law. In fact, the defendants appear to be complying with federal law by promptly considering Adelphia's modification request. See, e.g., 47 U.S.C. § 521 (2) (one purpose of the Cable Act is to establish franchise procedures and standards); 47 U.S.C. § 545(a) (2) (board must render a decision on proposed modification within 120 days of receiving franchisee's request); 47 U.S.C. § 546 (setting forth procedural requirements applicable to franchise renewal).

The two cases upon which Adelphia relies are not sufficiently similar to this case to require a different conclusion. In both Tribune-United Cable of Montgomery County v. Montgomery County, Maryland, 784 F.2d 1227(4th Cir. 1986), and Cable TV Fund 14-A, Ltd. v. Naperville, 1997 WL 433628 (N.D. Ill. 1997), it appears the franchisees presented their modification proposals early in the process, at or near the initiation of enforcement activities addressing the breaches of the franchise terms subject to the modification request. See Tribune-United 784 F.2d at 1229 (modification request submitted one week after notice of default); Naperville, 1779 WL 433628 at *1 (modification request already pending at time of alleged breach of franchise). In this case, however, Adelphia is tactically pursuing multiple objections to the Board's actions and seeking to stay an obligation it incurred as a result of an enforcement proceeding which it settled by a Stipulation and Agreement approximately two years ago. See Paper 18 at Exs. 3 and 4 (agreement dated May 31, 2001 and approved by the Board on August 2, 2001).

In addition, the rationales underlying these two decisions presently appear inapplicable. The Tribune-United court noted the Cable "Act does not explicitly require that the imposition of penalties be stayed or enjoined pending consideration of a modification request," but believed local

franchising authorities should not be permitted to burden a franchisee "by enforcing massive penalties during the pendency of modification proceedings." 784 F.2d at 1231 (emphasis added).

Likewise, the Naperville court was concerned with undue burdens placed on the franchisee pending decision on its modification request; it stated: "While the Court concludes that the city is stayed from collecting the liquidated damages during modification, the damages will continue to accrue while the modification procedure is completed." 1997 WL 433628 at *10. The court, however, did not stay all penalties; it noted "[i]f Jones is not granted modification, it will have to pay in damages roughly the same amount it would have been paying all along for its franchise fees" Id. (emphasis added).

In this case, there is no indication that the Board currently is attempting to collect damages or penalties from Adelphia. Absent good cause shown, the Court finds insufficient reason to interfere with planned or ongoing state administrative proceedings which are being conducted pursuant to the directives of the Cable Communications Policy Act.

B. Motion to Stay All Proceedings

Adelphia also asks the Court to stay all proceedings in this case pending a final order and resolution of the Adelphia I case. See Motion to Stay All Proceedings (Paper 8). The basis of its argument, see Memorandum of Support (Paper 9) at 9, is that this Court should invoke "the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." See Schiff v. Metzner, 331 F.2d 963, 964-65 (2d Cir. 1964) (citation and quotations omitted).

"The District Court has broad discretion to stay proceedings as an incident to its power to control its own docket." Clinton v. Jones, 520 U.S. 681, 701 (1997). "The proponent of a stay bears the burden of establishing its need." Id. at 708.

The parties agree that Softview Computer Prods. Corp. v. Haworth, 2000 WL 1134471 (S.D.N.Y 2000) sets forth the standard for determining whether a stay is appropriate. According to Softview Computer, the Court should consider:

(1) whether a stay would unduly prejudice or present a clear tactical disadvantage to the nonmoving party; (2) whether a stay will simplify the issues in question and trial of the case; and (3) whether discovery is complete and a trial date has been set.

Id. at *2 (citation omitted).

Upon consideration of these factors, the Court finds Adelphia has not met its burden of establishing a stay of this case is appropriate. As all parties acknowledged at oral argument, the issues presented in this case, while related to those in Adelphia I, are not the same and will not necessarily be resolved should the Adelphia I litigation be completed first. Furthermore, the Vermont Department of Public Service and the Public Service Board both object to Adelphia's request because they believe a stay of this proceeding will only delay complete resolution of the parties' dispute, thereby prejudicing the public's interest in promptly bringing cable services to as many Vermont residents as is possible. Cf. Clinton v. Jones, 520 U.S. at 707 ("Such a lengthy and categorical stay takes no account whatever of the respondent's interest in bringing the case to trial.") Lastly, the Court is not convinced any discovery required in this suit, in addition to discovery which will be undertaken in Adelphia I, will be so expensive and burdensome as to require a complete stay of this action for an indefinite period.

III. Conclusion

The Motion to Stay Defendants' Enforcement Activities is DENIED. The Motion to Stay All Proceedings is DENIED.

SO ORDERED.

Dated at Brattleboro, Vermont, this ____ day of October, 2003.

J. Garvan Murtha
United States District Judge